No. 75-2117

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RONALD V. DELLUMS, et al.,

Plaintiffs-Appellants

v.

JAMES M. POWELL, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF PLAINTIFFS–APPELLANTS

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JAMES M. POWELL

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CERTIFICATE OF COUNSEL

The undersigned, counsel of record for appellants, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that judges of this Court may evaluate possible disqualification or refusal:

Congressman Ronald V. Dellums
and approximately 1,200 persons
arrested on the Capitol steps
on May 5, 1971.

Warren K. Kaplan

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TABLE OF CITATIONS AND AUTHORITIES

**Denotes authorities chiefly relied upon.

NON-DECISIONAL AUTHORITIES:

MISCELLANEOUS:

STATEMENT OF THE ISSUES PRESENTED

Did the trial court err in granting a directed verdict for defendant Kleindienst when the evidence showed:

1. that Kleindienst convened and presided over a series of meetings of top-ranking federal and District law enforcement officials and others which formulated the government's response to the May Week demonstrations;

2. that Kleindienst established the basic tactic to be followed by the government as the making of as many arrests as possible.

3. that the government's planned response involved a program of mass preventive arrests and preventive detention which failed to distinguish between person engaged in illegal activities and those engaged in lawful demonstrations.

4. that during May Week, more than 13,000 persons, including the plaintiff class members, were arrested in the District of Columbia, without regard for the existence or non-existence of probably cause;

5. that Kleindienst personally barred the release of several thousand arrested persons whom he knew to

be improsecutable and who were being held under grossly deficient conditions of detention;

6. that Kleindienst was in almost continuous communication with the Chief of the Metropolitan Police Department throughout May-Week, and conferred with him concerning plaintiffs' anticipated demonstration at the Capitol steps both before and after that demonstration took place; and

7. that Kleindienst exercised supervisory authority and made material decisions in the prosecution of plaintiffs which followed their wrongful arrest.

STATEMENT OF THE CASE

REFERENCE TO PARTIES AND RULINGS

This appeal is taken from the District Court's granting of a directed verdict for the defendant, Richard Kleindienst, in appellants' (hereinafter "plaintiffs") class action for injunctive relief and damages arising from the arrest of named plaintiffs and approximately 1,200 other members of the class on the steps of the United States Capitol on May 5, 1971.

Plaintiffs, who were granted a substantial damages verdict by the jury against the involved police officials and the District of Columbia,[1/] also accused the then Deputy Attorney General Kleindienst, and other high-ranking Justice Department officials, of conspiring with police and District officials to engage in unlawful, preventive mass arrests and

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1/ Defendants James Powell, Chief of the Capitol Police, Jerry Wilson, Chief of the D. C. Police, and the District of Columbia have appealed that judgment (D.C.Cir. No. 75-1974 and 75-1975), and that appeal is consolidated with this one. Injunctive relief and damages have already been awarded in a number of cases growing out of those arrests. E.g., Sullivan v. Murphy, 380 F.Supp. 867 (D.D.C. 1974); Roberts v. Wilson C.A. No. 1436-71 D.C.D.C., aff'd without opinion, 484 F.2d 1273 (D.C.Cir. 1974); Tatum v. Morton, 402 F.Supp. 719 (D.D.C. 1974).

preventive detention during the May Week (May 3-5, 1971).[2/]

At the conclusion of all the evidence, the trial court granted defendant Kleindienst's motion for a directed verdict and on October 20, 1975 entered final judgment dismissing plaintiffs' claims against Kleindienst.

STATEMENT OF FACTS

On January 16, 1975, a jury of the United States District Court for the District of Columbia, at the conclusion of a six-week trial of this action, found that the May 5, 1971 arrests of over 1,200 persons on the Capitol steps was unlawful, unreasonable, and a violation of their constitutional rights. The jury awarded to each member of the class damages for violation of First Amendment rights, false arrest, cruel and unusual punishment in the conditions of detention, and malicious prosecution.

Plaintiffs offered evidence to show that the May 5, 1971 arrests were part of an overall plan or approach devised by the police officials, defendant Kleindienst, and other high-ranking members of the Justice Department to engage in massive preventive arrests and preventive detention

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2/ The other federal defendants were then-Attorney General John Mitchell, who was granted a severance due to his involvement in criminal proceedings, and Assistant Attorney General Will Wilson who was dismissed due to inadequate service of process.

during the May Week period in which they expected large numbers of persons to engage in unlawful actions.

A. The General Role Of The Justice Department During The May Week Demonstrations.

Then-Attorney General Mitchell and then-Deputy Attorney General Kleindienst had the primary responsibility for the Executive Branch response to the anticipated May Week 1971 demonstrations (Tr. 1491, 1598, 2665-68, 2707; App. 949, 965, 1624-27, 1666). Mitchell designated Kleindienst to be in charge of coordinating all government activities (Tr. 2665-68; App. 1624-27). Kleindienst's deputy, Harlington Wood, negotiated extensively with the demonstration leadership on behalf of Kleindienst and the executive branch (Tr. 1456, 1459, 1469, 1474; App. 914, 917, 927, 932). Kleindienst convened and presided over a series of crucial meetings at the Justice Department which dealt with all aspects of the governmental response, national and local, to the demonstrations (Pl.Exh. 12 A-E; App. 2406-42).

Because the pre-Home Rule District of Columbia was totally a federal entity in 1971, ultimate authority over the actions of its appointed officials rested with the President. Reorganization Plan No. 3 of 1967, 32 F.R. 11669, F.R.Doc. 67-9507. The Chief of the Metropolitan Police Department, Jerry V. Wilson (hereinafter referred to as "Chief Wilson") testified that the chain of command over law enforcement activities during demonstrations in the District

of Columbia generally, and during the May Week protests specifically, ran directly from defendant Kleindienst at the Justice Department to himself at the Metropolitan Police Department (Tr. 2637, 2707; App. 1596, 1666). Chief Wilson testified that he had about "three dozen" conversations with Kleindienst during May Week (Tr. 2707; App. 1666). Deputy Assistant Attorney General Fred Ugast served as liaison, accompanying Chief Wilson throughout May Week (Tr. 2707; App. 1596).

B. Advance Preparations For The May Week Demonstrations.

As early as late 1970, Justice Department officials were aware that certain anti-Vietnam war groups planned demonstrations in Washington, D.C. for the following April and May (Tr. 2633; App. 1592). Chief Wilson participated in a series of meetings with defendant Kleindienst during the first four months of 1971, at which they and others discussed intelligence reports of the demonstrators' intentions and capabilities and possible military support (Tr. 2633-36; App. 1592-95).

The Department of Justice, in conjunction with the Department of Interior, granted a permit for the use of West Potomac Park by the May Week protesters. Mr. Kleindienst, who had participated in the agreement to make the park available, later explained to other officials that

the demonstrators were allowed there "to control and delay them" (Pl.Exh. 12A, p. 12; App. 2417) and "to get them out of the way where they could be watched". Id. at 14.

In the latter part of April, Kleindienst, Wood and Assistant Attorney General Robert Mardian met in Kleindienst's office with Philip Hirschkop, chief counsel and negotiator for the demonstration leadership. They discussed permit violations in West Potomac Park, principally the presence of tents and bonfires; all agreed that both could continue, but would be discouraged (Tr. 1466-68; App. 924-26).

By the end of April, the preparations for May Week preoccupied other high officials in the Justice Department. James Turner, a Deputy Assistant Attorney General in the Civil Rights Division, recruited personnel for the "street team" program which he directed (Tr. 1400; App. 895). These teams were to observe the demonstrations and report information to the Attorney General to facilitate coordination of the government's response to the demonstrations (Tr. 1421; App. 911).

At 9:30 a.m., Saturday, May 1, Kleindienst convened the first of several large meetings in his con-

ference room.[3/] The principal participants in these meetings, in addition to Kleindienst, were Mardian, John Ehrlichman of the White House, William Rehnquist, Assistant Attorney General for the Office of Legal Counsel, several generals, and Chief Wilson. Kleindienst opened the meeting by calling for a review of the situation and for a discussion of intelligence to determine if any "different plans" were necessary. He suggested prepositioning of military forces and "some possible diversionary tactic" when the demonstrators left the Potomac Park campsite (Minutes of Meeting of 9:30 a.m., May 1, 1971, Pl.Exh. 12A, p. 3; App. 2408). Chief Wilson stated his belief that most of the demonstrators were not here to disrupt and that one or two thousand people might be at the traffic disruption focal points. Id. at 4. There followed a discussion of the possible use of troops and arrests (Id. at 4-6), with Kleindienst, Mardian and Chief Wilson as active participants. Chief Wilson, noting the government's emphasis in the May Week

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3/ The minutes of these meetings were referred to in this Court's Decision in Apton v. Wilson, 165 U.S.App.D.C. 22, 506 F.2d 83, n. 12 (1974). In the present case, as in Apton, the federal defendants strongly resisted discovery of these minutes, claiming that they were privileged and ". . . represent the essence of governmental deliberations recommendations and the consideration of policy options." (Points and Authorities to Opposition of Federal Defendants to Plaintiffs' Motion to Compel Discovery, November 12, 1974, p. 2; App. _____).

planning on arrests, rather than dispersals (the usual response to unlawful demonstrations) (Id. at 4), informed the other participants that the number of "radicals" present among the demonstrators was "not great" (Id. at 6), that the past week had been peaceful (Id. at 6), and that "the attitude in the West Potomac Park campground was now okay". (Id. at 7).

When Kleindienst urged the use of troops, General Exton's recommendation to wait a day before deciding was quickly rejected. Ehrlichman declared himself "amazed" at the General's attitude and "could see nothing to be gained by waiting until Sunday". President Nixon, Ehrlichman made clear, wanted the City to be kept open "even if it took 100,000 [troops]". He added that if the government was short on troops "someone would be in big trouble". He said there was to be no misunderstanding about it and that "no fine tuning was needed ..." Id. at 9. Kleindienst discounted the idea that the use of troops would aggravate the situation. Id. at 9-10. Mardian cited much mail being received critical of the government's position. Ehrlichman "stated that the President was ready to go further than had been discussed" so far. Id. Kleindienst stated that "efforts had been made up to now not to be too heavy or strong in trying to control the situation". Id. at 11. When Chief Wilson expressed concern about the political effect of the use of troops, Rehnquist responded that the

demonstrators' plans "required a strong response, a plan on the 'high side'". He "said something should be done to prevent the demonstrators from moving from their camp". Id. at 11. Kleindienst again proposed "some diversionary tactics". "The government," he said, "should take the initiative". Id. at 12. Mardian suggested "warning the protestors to leave and then arresting them" and "Chief Wilson and others discussed the matter of arresting and getting the protestors out of town". Id. Ehrlichman then proposed announcing at West Potomac Park that the gathering was illegal and must be dispersed. It would be a "psychological maneuver" he commented and "the arrests could begin Sunday afternoon". Id. The others agreed almost immediately, and the police move was set for sunrise the following day, Sunday, May 2. Id. Chief Wilson suggested that the campsite could be closed down "as a big pot party" and Kleindienst thereupon offered to furnish 200 agents of the Bureau of Narcotics and Dangerous Drugs for that purpose. Id. at 14.

Later that day Mr. Kleindienst attempted but failed to find Philip Hirschkop (Minutes of May 1, 5:00 p.m. Pl.Exh. 12B, p. 5; App. 2426). Assistant Attorney General James Turner was summoned to Kleindienst's office about 4:00 o'clock that afternoon and was advised that West Potomac Park would be cleared at dawn the following day (Tr. 1424; App. 912).

Kleindienst convened a second meeting at 5:00 p.m. on Saturday, May 1 in his conference room. Participants included Mardian, John Dean of the White House, Chief Wilson and officials from the military, several federal agencies and the Metropolitan Police Department. Kleindienst opened the meeting by announcing that with 20,000 to 40,000 demonstrators in the park the previous night, "the government had an obligation to act" to disperse the demonstrators before 5:00 a.m. Monday (Pl.Exh. 12B, p. 1; App. 2422):

> "The government's silence might be an invitation for those demonstrators already here to remain and for others to come to D. C. Therefore, the government's obligation was to disperse the demonstrators so that they would leave the City. The majority probably would not remain if they felt they would be arrested." Id. at 1.

Kleindienst reviewed decisions reached earlier on clearing West Potomac Park, and Chief Wilson detailed the police tactics planned. Id. at 2-4. The decision, Kleindienst said in response to Chief Wilson's question, was to be attributed to Justice, Interior and the police. Id. at 4.

Earlier that Saturday, the Board of Judges of the Superior Court had rejected Chief Wilson's request to raise collateral for misdemeanor arrests from $10.00 to $50.00 (Tr. 2645; App. 1604). Chief Wilson informed the participants at the meeting that "In view of the collateral

situation with the court, he would not accept collateral, which results in the necessity for the court to fix the bond. This might be done on some prearrangement by the court on the defendant's promise to leave the City". Id. at 4.

Kleindienst said that he planned to meet with Hirschkop that evening and that while he "would advise Mr. Hirschkop of the bad conditions" in West Potomac Park, he would not disclose the freshly made plan to evict all the demonstrators. Id. at 5. Miscellaneous intelligence reports followed, including Mardian's report that "the anticipated tactics to be used by the demonstrators included sitting in the street, obstructing traffic in shifts, releasing baloons and flying kites to foul up helicopter operations". Id. at 5. Kleindienst asked if anyone saw any serious defect in the plans outlined. "There was no response indicating disagreement". Id. at 6. Chief Wilson described further tactical details, and Kleindienst finally announced that the committee would remain on a 24-hour call basis and scheduled the next meeting for 12:00 noon Sunday. Id. at 6-7. The meeting adjourned at 5:50 p.m.

Shortly thereafter, Kleindienst and Wood met with Hirschkop in Wood's office. Hirschkop encountered Chief Wilson as he arrived; he noticed that the other officials present were startled and tried to usher the Chief

away (Tr. 1471; App. 929). Kleindienst told Hirschkop that complaints had been received from members of Congress about the tents and camp fires at West Potomac Park and asked Hirschkop to "try to hold these things down". At Hirschkop's request, Kleindienst assured him unequivocally, contrary to the decision already made, that the demonstrators would be permitted to remain at the park (Tr. 1470, [illegible] App. 928, 930, 1198). After the meeting with Kleindienst, Hirschkop met with the demonstration leaders and relayed to them Kleindienst's assurances that the demonstrators could remain at West Potomac Park throughout May Week (Tr. 1472; App. 930).

Chief Wilson and his forces went to the Park at 5:00 a.m. Sunday, May 2nd, and announced the cancellation of the permit and ordered dispersal (Tr. 2641; App. 1600). Hirschkop, informed by telephone of the police move, and unable to contact Wood, called the Mayor's Command Center but could find no one there who could determine what was happening (Tr. 1473; App. 931). At mid-morning, when he reached Wood, the latter apologized, saying that it was Kleindienst's decision; he (Wood) had not meant to mislead Hirschkop at the meeting the previous evening, but he could not go against orders (Tr. 1474; App. 932).

At 1:00 p.m. Sunday afternoon Mitchell convened the next meeting in his conference room (Pl.Exh. 12C; App. 2430). In attendance were Kleindienst, Will Wilson,

Chief Wilson, and representatives of various federal agencies and the military. Chief Wilson reported that the operation that morning had gone as planned. He estimated that only 3,000 to 5,000 protestors would remain in the city for disruptive tactics. Id. at 1. He believed the police could cope with the 2,000 whom he thought would try to obstruct traffic. Mitchell, however, wanted "full implementation of the operation that had been initiated." Id. at 2, and suggested "that the troops not be kept just for a reaction". Id. at 3. Kleindienst, also urging the use of troops, proposed that soldiers be used for traffic control, bridge

security, and aid to citizens, to relieve the police, "who would be used for arrests". Id. at 2. Kleindienst also twice proposed that soldiers while not themselves authorized to make arrests, could seize and detain offenders for arrest by the police. Id. at 3, 4. Mardian "suggested that as many arrests be made as possible to prevent the return of the protestors looking for trouble as there is some indication of a camp-in planned at the Capitol," to which Kleindienst responded: "[t]hat was the general impetus of the program". Id. at 4. Chief Wilson and the military were sent to work out a plan to be approved by Mitchell later that day (Id. at 6) and the meeting was recessed.

At 5:00 p.m. that Sunday afternoon, Mitchell convened a second meeting in his conference room (Pl.Exh. 12B; App. 2422). Present were Kleindienst, Ugast, Mardian,

John Dean, Chief Wilson and representatives of the military, the D. C. Police Department and the Justice Department. Chief Wilson's and Mardian's intelligence reports predicted 10 to 15 thousand demonstrators. When Mitchell asked if the police could handle these numbers, Chief Wilson responded that he could not handle that many "if he arrested all day". Id. at 1, 2. After a report on police-military coordination, Mitchell "asked about the matter of arrests". Id. at 2. Chief Wilson described to him the plans for police positioning and the use of buses for temporary detention, and Mitchell expressed satisfaction with the plans. Id. at 2, 3. In response to Mardian's inquiry about plans for the traffic circles, Chief Wilson "stated that the only tactic is to surround and arrest". Id. at 3. The meeting adjourned at 5:25 p.m.

C. The Events of May 3.

On the morning of May 3, 1971, approximately eight thousand persons were arrested in the District of Columbia, almost all without the recording of any information, including the time, place, and reason for arrest and identity of the arresting officer (Tr. 2716-18; Cf.; App. 1675-77). Sullivan v. Murphy, supra. at 948.[4/] As this Court

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4/ Chief Wilson's knowledge of the critical importance of field arrest forms for successful prosecutions had been reflected in a memorandum from him to the force only two (continued)

emphasized in Sullivan v. Murphy, supra, without field arrest forms, there was no hope of sustaining prosecutions against the almost 8,000 persons arrested. Id. 478 F.2d at 950, 969. Moreover, the arrests themselves were indiscriminate, so that "[t]he innocent as well as the guilty were in large numbers swept from the streets and placed in detention facilities." Id. 478 F.2d at 959. The tactic of mass arrest was used, not for the purpose of "bringing lawbreakers to book" (478 F.2d at 969), but "as a means of clearing the streets." (478 F.2d at 967).

Notwithstanding these facts, the Justice and police officials proceeded with their plan, not merely to remove from the streets the masses of innocent and lawbreaking persons they had swept up, but to detain and book them on criminal charges. Some of the arrested persons were brought to Superior Court for arraignment that morning. Assistant Attorney General Will Wilson, present at the Superior Court, instructed the U. S. Attorney in charge of Superior Court Prosecutions that "the most important thing is to make sure these people are fingerprinted . . . and you have mug shots taken" and that he (Wilson) "want[ed]

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weeks earlier entitled "Arrests in Connection With Demonstrations" (Pl.Exh. 22; App. ___). In this memorandum, the Chief mandated that "A Field Arrest form shall be made for every arrest." (Ibid. p. 1.) Notwithstanding this awareness, it was Wilson who ordered the suspension of the forms at 6:23 a.m. (Tr. 2648; App. 1607).

to see who we turn up here." (Tr. 1376-7; App 889-90). Although judges were ready and prosecutors available for arraignment, the arrested persons were not then arraigned, but were taken back to detention centers around the city, and some were not brought back to court for arraignment until the following day (Tr. 1377; App. 890).

In the early afternoon of Monday, May 3rd, Hirschkop received an urgent message to come to the Mayor's Command Center. He had been furnished with a car, a police escort, and a police radio as the prime communications link between the police and the demonstrators (Tr. 1475-6; App. 933). Upon arriving at the Mayor's Command Center, Hirschkop was informed by Gerald Caplan, general counsel of the Metropolitan Police Department, that over seven thousand people were in custody and that there were problems of lack of food and blankets. Caplan made the following proposal: If the demonstrations scheduled for the remainder of the week were called off, and the demonstrators would agree to leave the city, the arrested persons would be released and there would be no felony prosecutions of the leaders; if not, there would be misdemeanor prosecutions of the arrestees and felony prosecutions of the leadership.[5/] (Tr.

5/ Hirschkop protested that there could be no misdemeanor prosecutions of the arrestees in the absence of

1480-84; App. 938-42). Hirschkop pressed Caplan for his authority to make this offer, and was told that the authority came from Kleindienst or Kleindienst's office (Tr. 1481; App. 939). After discussing the proposal with demonstration leaders, Hirschkop got back in touch with the Mayor's Command Center and reported that the proposal could not be accepted since, among other reasons, the demonstration leaders had no authority to direct people to leave town or to stop lawful demonstrations (Tr. 1487; App. 945).[6/]

At 3:30 p.m. Turner expressed to Kleindienst and Mitchell his concern for the expeditious processing of the large numbers of arrestees. Kleindienst responded that Will Wilson would be assigned to the Department's efforts to expedite the processing (Tr. 1400-01, 1403; App. 895-96, 898). Turner himself was subsequently asked by Will Wilson's assistants, Henry Peterson and Carl Belcher, to recruit lawyers from the Justice Department Civil Rights Division to

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field arrest forms, and Caplan admitted that there were "problems". As to the felony prosecutions against the leaders, Hirschkop's assertion that the government had no case was met with the observation that prosecutions would in any event tie the leaders up in court and cost them money (Tr. 1481; App. 939).

6/ Four of the principal leaders of the demonstration were subsequently indicted for felonies, all of which were ultimately dismissed (Tr. 1490; App. 948).

participate in the processing. Tr. 1401; App. 896). In the early evening Turner returned from the District Jail to report to Will Wilson. At the jail, Turner had seen twelve to fifteen hundred people in the courtyard being "processed". People were being fingerprinted, photographed and otherwise processed but then "inexplicably, in my judgment, they were returned to the courtyard" and apparently were not being permitted to post collateral (Tr. 1401; App. 896). Turner considered the situation "very troublesome" and called Kleindienst to inform him of the "chaotic" situation (Tr. 1401; App. 896).

The majority of those arrested during the day were still in custody when the Attorney General convened a 7:00 p.m. meeting in his office. Chief Powell, Chief Wilson, Will Wilson, Kleindienst and Gerald Caplan, among others, were in attendance (Pl. Exh. 12E; App. 2442).

The Attorney General opened the meeting by extending the compliments of the President and his thanks for a good operation (Pl. Exh. 12E, p. 1; App. 2442). It was noted that bail progress was slow and higher bonds were being set, but that many could be expected to be released during the night. Chief Wilson stated that "the demonstrators on the outside" were now down to about twenty-five hundred. Ibid. p. 1.

The Attorney General called upon Will Wilson to explain the processing of those who had been arrested. Wilson explained that the primary objective was to secure fingerprints and photographs of each arrestee, and only thereafter to determine whether it was a valid arrest and whether there was any information as to the arresting officer and the place and circumstances of the arrest. Ibid., p. 2. Wilson further explained that persons as to whom no adequate information could be obtained would be released if they paid Ten ($10.00) Dollars collateral.7/ Ibid., p. 3. The U.S. Attorney reported that he had been served at 5:00 p.m. with papers in a habeas corpus proceeding claiming that the arrests were without probable cause, and that the defendants were being illegally held, and that he had

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7/ The minutes do not indicate that any of the participants raised any question or objection to the concept of holding people for payment of collateral when there was no adequate police identification. Cf. Sullivan v. Murphy, 478 F.2d at 974, 975 (referring, inter alia, to "a corruption" of the collateral procedure).

By contrast, members of the plaintiff class, arrested on May 5th with field arrest forms, were not permitted to post collateral after processing at the Coliseum, but were required to wait (up to thirty-six hours) to be taken to Superior Court for arraignment. (Tr. 540, 858-9, 974; App. 385, 663-64, 739). One reason for the difference in treatment was offered by Chief Wilson, who conceded that trying to arraign the people arrested without field arrest forms "created a problem. There was nothing to tell the court [about the arrests]." (Tr. 2732; App. 1691).

requested twenty-four hours in which to answer. Ibid, p. 3. 8/

It was decided to move the arrestees from R.F.K. Stadium and the yard of the D.C. Jail to the Uline Arena (Coliseum). Chief Wilson made arrangements with Will Wilson for the latter to move his "identification teams" into the Coliseum, and the meeting adjourned. Ibid., p. 4.

Turner arrived at the Coliseum at about 9:00 p.m. that evening. Finding that processing had not begun, he had one end of the floor cordoned off and tables set up (Tr. 1403-4; App. 898-99), and directed the Justice Department attorneys to their tasks (Tr. 1410; App. 905). Before the processing began, Turner conferred with Sgt. Cecil Kirk of the Metropolitan Police Department, who had been sent to the Coliseum to set up a processing procedure. Kirk informed Turner that the charge was to be disorderly conduct for everyone in the Coliseum (Tr. 3360; App. 1800). Kirk had been given a list of seven Metropolitan Police Department officers whose names were to be used in rotation as the "arresting officer" on the processing forms (Tr. 3360,

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8/ Chief Judge Greene of the Superior Court was unwilling to delay action for twenty-four hours. The course of proceedings in the habeas corpus is summarized in Sullivan v. Murphy, supra, 478 F.2d at 951-2.

1406; App. 1800, 901).[9/] Kirk discussed this procedure with Will Wilson who concurred that "this was the only way to do it." (Tr. 3363; App. 1803).[10/] Will Wilson had previously discussed with Chief Wilson the difficulties inherent in prosecuting arrestees without field arrest forms (Tr. 2730; App. 1689).

D. The Events Of May 4th.

At approximately 5:30 a.m. on May 4, 1971, Assistant Attorney General Turner reported to Will Wilson his belief that there was no basis for holding people any longer and that to do so would "jeopardize their civil rights" (Tr. 1412; App. 907). The two Assistant Attorneys General jointly called Kleindienst and discussed the matter

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9/ Turner had brought with him volunteer lawyers from the Department of Justice to assist in the processing. Turner informed them that any of them who did not feel they could participate in the name-rotation exercise "in good conscience" could leave. All remained (Tr. 1412; App. 907). Chief Wilson testified that he subsequently became aware of the name-rotation procedure, considered it improper, but did not have any investigation made or take any disciplinary action (Tr. 2731-32; App. 1690-91).

10/ Will Wilson subsequently suggested using the name of Chief Jerry Wilson as the arresting officer (Tr. 1406; App. 901). This procedure was changed later and the procedure reverted to using the original seven names, but with the added feature of deleting the word "arresting" and inserting the word "court" before "officer" on the form (Tr. 1407; App. 902).

with him. Turner recommended that the arrestees be released since there was no information against many to justify detaining them; and what information there was could not be sorted out in a reasonable amount of time (Tr. 1413; 1415; App. 908, 910). Kleindienst replied that he would consider this recommendation, but did nothing (Tr. 1413; App. 908). The demonstrators were not released.[11/]

On Tuesday, May 4th, approximately two thousand people were arrested at a demonstration held in front of the Department of Justice,[12/] (Tr. 3447; App. 1842). The demonstrators initially grouped at Franklin Park, and then marched along the sidewalk with a police escort to the Department of Justice (Tr. 3651-2; App. 1941-42). By use of barricades and a police escort the demonstrators were ushered into the area of 10th Street between Pennsylvania and Constitution Avenues adjoining the Justice Department (Tr. 3448, 3651, 3666-72; App. 1843, 1941, 1943-49). Metropolitan Police Department officers of the Special Operations Division (S.O.D.) sealed off the ends of 10th Street at

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11/ Approximately fifteen hundred of the May 3rd arrestees who had refused to be processed were finally released by order of the District of Columbia Court of appeals on Wednesday, May 5th. See, Sullivan v. Murphy, 478 F.2d at 952.

12/ An overview of the May 4th arrests is found in Sullivan v. Murphy, supra, 478 F.2d at 953 4.

Pennsylvania and Constitution Avenues (Tr. 3668-69; App. 1945-46). The demonstrators were mostly seated, some engaged in singing "but for the most part were fairly quiet". (Tr. 4148; App. 2154).

With Chief Wilson present at the scene (Tr. 3669; App. 1946), an announcement was made that anyone who did not want to be arrested must leave the area. A number of people immediately attempted to leave, but were not permitted to pass through the police lines.13/ 14/

E. The Events of May 5th.

Wednesday, May 5 was the third and final day of the May Week demonstrations. It was on that day that the plaintiff class of approximately 1,200 persons was arrested on the east House steps of the United States Capitol.

13/ A woman photographer testified that she rose to leave within thirty seconds of the announcement but was not permitted through the police line at the Pennsylvania Avenue end of 10th Street. She was told by the police to try the Constitution Avenue end and did so, but was again not allowed to leave (Tr. 4143-48; App. 2149-54).

A student at Federal City College who was not a demonstrator but "just bystanding" tried immediately to leave after hearing the order, but was told that he would "have to be arrested just like everyone else" (Tr. 4149-54; App. 2155-60).

14/ The pattern of issuing a perfunctory order to leave and then arresting persons who attempted to leave was repeated at the time of the May 5th arrests at the Capitol steps. (Tr. 463, 603, 748, 973, 1043, 1263; App. 313, 444, 579, 738, 775, 865). The tactic seems to

(continued)

At approximately 7:00 a.m. on that morning Deputy Attorney General Kleindienst met with Chief Wilson to discuss the anticipated demonstrations scheduled for that day at the Capitol.[15/] Kleindienst informed Chief Wilson that the Justice Department intelligence sources indicated that about 2,000 demonstrators were likely to participate. Chief Wilson stated that he would make Metropolitan Police Department personnel available at the Capitol, but this would require the use of military personnel to maintain traffic flow elsewhere in the city (Tr. 1600-1603; App. 967-70).

In the interest of avoiding duplication, plaintiffs incorporate by reference herein the description of the circumstances surrounding the arrest, detention and subsequent prosecution of plaintiffs set forth at length in the brief filed by plaintiffs as appellees in Cases 75-1974 and 75-1975 at pages 11-23.

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have been originally suggested by Assistant Attorney General Robert Mardian at the first May 1st meeting at Kleindienst's office:

> Mr. Mardian raised the question of warning the protestors to leave and then arresting them.
>
> Chief Wilson and others discussed the matter of arresting and getting the protestors out of town. (Pl.Exh. 12A, p. 12; App. 241[illegible].

15/ Chief Wilson was in almost constant communication with Kleindienst. By his own admission, Wilson had approximately three dozen conversations with Kleindienst during May Week (Tr. 2707; App. 1[illegible].

On the evening of May 5th, Chief Wilson made a telephone report of the day's events at the Capitol to Kleindienst and Mitchell in a conference telephone call to the Attorney General's Office (Tr. 1600; App. 967).

Plaintiffs were subsequently prosecuted by the United States Attorney for violations of the Capitol Grounds Statute (9 D.C. Code §124) and the Unlawful Entry Statute (22 D.C. Code §3102). Authority to make decisions on matters arising during the prosecution had to be obtained from Kleindienst's office. (Tr. 1496; App. 954).

ARGUMENT

I. THE COURT BELOW ERRED IN DIRECTING A VERDICT FOR DEFENDANT KLEINDIENST.

The trial court granted the motion for directed verdict on the ground that Kleindienst was not "actively involved" in the arrest of plaintiffs, and that "involvement on a conspiracy basis" was not grounds for imposing liability (Tr. 4797-98; App. 2254-55). This ruling was factually and legally wrong. The evidence shows that defendant Kleindienst played a dominant role in a conspiracy to violate the constitutional rights of May Week demonstrators and others, including plaintiffs.

In reviewing the grant of a motion on appeal, the appellate court must view the evidence in the light most favorable to the party against whom it was granted, and give that party the benefit of all reasonable inferences. Calloway v. Central Charge Service, 440 F.2d 287, 142 U.S. App.D.C. 259 (1971); Galloway v. United States, 319 U.S. 372 (1943); Princemont Construction Corp. v. Smith, 433 F.2d 1217, 140 U.S.App.D.C. 111 (1970); Alden v. Providence Hospital, 382 F.2d 163, 127 U.S.App.D.C. 214 (1967). Application of this test requires the reversal of the verdict directed in favor of defendant Kleindienst.

A. There Was Evidence Of A Conspiracy To Deprive May Week Demonstrators Of Their Constitutional Rights.

The gist of a civil conspiracy, like its criminal counterpart, is an agreement either to achieve an unlawful purpose or to achieve a lawful purpose in an unlawful manner. Blankenship v. Boyle, 329 F.Supp. 1089, 1099 (D.C.D.C. 1971). Here there was evidence from which the jury could have found an agreement among Kleindienst and other defendants to achieve a lawful purpose, namely, keeping the streets clear of traffic-blockers, by unlawful means, namely, preventive mass arrests and preventive detention without regard to probable cause.

In an ordinary conspiracy case, the purpose of the alleged conspirators must be inferred from their actions. In the present case, there are both a multitude of overt acts from which such inferences can appropriately be drawn and also the minutes of the meetings and conversations in which the basic plans were formulated.16/

16/ Just prior to trial, plaintiffs subpoenaed and obtained a court order for production of White House tapes during and immediately prior to May Week (App.). President Nixon intervened with a motion to quash and the trial court deferred the entire matter. It is anticipated that these tapes will become available prior to the trial of plaintiffs' claims against defendant Mitchell.

Defendants, including defendant Kleindienst, were charged with participating in a conspiracy which brought about the unwarranted arrest, detention, incarceration and criminal prosecution of plaintiffs. Although plaintiffs were only required to show evidence of participation by Kleindienst, evidence at trial indicated that the federal defendants were the dominant force in the conspiracy. The scope and purpose of the conspiracy is largely set forth in the minutes of the five meetings which occurred at the Justice Department on May 1st, 2nd and 3rd. These minutes reveal a pervasive common understanding and purpose to remove, prevent and deter persons from participating in the May Week anti-war demonstrations by mass preventive arrests, and preventive detention.

1. The Eviction From West Potomac Park.

The first overt act in the conspiracy was the carefully plotted and deceitfully concealed eviction of the demonstrators from West Potomac Park. By Saturday, May 1st, large numbers of anti-war demonstrators had congregated in the Park (Pl.Exh. 12A, p.3; App. 2408). They had camped pursuant to a permit negotiated with the Department of Justice and the Department of Interior (Pl.Exh. 12B, p. 4; App. 2425). . The permit had been granted, according to defendant Kleindienst, as "a way to control and delay" the demonstrators, and "to get them out of the

way where they could be watched" (Pl.Exh. 12A, pp. 12, 14; App. 2417, 2419). Although some demonstrators had erected tents and started small bonfires in violation of certain permit provisions (Id. at 14), the government had informed the attorney for the demonstration leaders that it did not regard these matters as sufficiently serious to warrant revoking the permit, but merely asked that they "hold it down."

At the meeting on Saturday morning, May 1st, Chief Wilson reported that the demonstrators camped in the Park were not a menace; that matters had been peaceful during the past week, and that "the attitude in the Park is now okay." Id. at 7. Nevertheless, it was decided that everyone in the Park would be evicted. The motive for cancellation of the Park permit and the resulting eviction was plainly grounded not in the conduct of the campers in the Park, but rather in the government's determination to drive all demonstrators from the city. No concern was expressed about the many lawful demonstration activities that had been planned. It was assumed that the desire to keep traffic flowing freely justified dealing with all "demonstrators" and potential demonstrators on the same basis. As Kleindienst explained it:

> The government's silence might be an invitation for those demonstrators already here to remain and for others to come to D. C. Therefore, the government's obligation was to disperse the demonstrators so that they would leave the city. The majority probably would not remain if they felt they would be arrested.
> Pl.Exh. 12B, p. 1; App. 2422.

The defendants' duplicitousness is further illustrated by the agreement deliberately to lie to Hirschkop. Kleindienst, with full knowledge that it was untrue, assured Hirschkop that evening that there were no plans to interfere with the Potomac Park camp during the duration of May Week (Tr. 1470; App. 928). The eviction planned by Kleindienst and the others was only hours away.

2. Mass Arrests.

At the final meeting on Sunday, May 2nd, in the Attorney General's Office, Kleindienst referred to the making of "as many arrests as possible" as being "the general impetus of the program" (Pl.Exh. 12C, p. 4). Chief Wilson, present at the meeting, plainly understood the "general impetus of the program", and commenced implementation early the following morning. At 6:23 a.m. field arrest forms were suspended, and by noon time, May 3rd, nearly eight thousand persons had been arrested. The arrestees, as this Court has previously noted, included "many persons [who] were deprived of their liberty without a scintilla of evidence tending to show that they had committed an offense." Sullivan v. Murphy, supra, 478 F.2d at 950.[17/]

17/ In Washington Mobilization v. Wilson, 400 F.Supp. 186 (D.D.C. 1975), appeal argued January 23, 1976, before MacKinnon, Robb, and Bredenkamp, C.J.J. (D.C. Cir. No. 79-2010), Chief Wilson testified that up to sixty (60)

(continued)

The arrests on May 3rd were made of individuals and small groups throughout the city. On both May 4th and May 5th, police arrested more than one thousand persons at a time. An important clue to the conspiratorial link between the arrests of May 4th and those of May 5th was the strikingly similar pattern characterizing the mass arrests at both the Department of Justice (May 4th) and the Capitol steps (May 5th):

(a) Both arrests were preceded by a peaceful march by the demonstrators, escorted by M.P.D. Police officers, from their gathering place to the intended place of demonstration (Tr. 3651-52, 3448, 437-38; App. 1941-42, 1843, 291-92).

(b) On both occasions, the demonstrators were promptly sealed in by a solid line of M.P.D. Police officers from the Special Operations Division (Tr. 3414, 3668-69; App. ____, 1945-46). 18/

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percent of the persons seized in a mass arrest are innocent bystanders. (R.88C, pp. 119-22). This Court may take judicial notice of the record in other pending cases. Gomez C. Wilson, 477 F.2d 411, 416, n. 28 (155 U.S.App.D.C. 242, 1973).

18/ This tactic had been explained at the Sunday, May 2nd meeting by Chief Wilson: ". . . The only tactic is to surround and arrest." Pl.Exh. 12D, p.4 (misnumbered as the second page 3); App. 2440).

(c) On both occasions, a perfunctory order to leave was given before arrests began. On May 4th, arrests started immediately after the order to leave was given, and persons who tried to comply with the order were not permitted to exit through the police line (Tr. 4143-54; App. 2149-60). On May 5th, the order to leave was recognized by Chief Powell as having been inaudible, but Powell accepted the advice of Chief Wilson not to repeat the announcement (Tr. 818; App. 643).

(d) On both occasions, Chief Wilson was present and arrests were carried by S.O.D. officers of the Metropolitan Police Department under the command of Deputy Chief Zanders (Tr. 3669, 3401, et seq.).

(e) On both occasions, no one in the enclosed area was given an opportunity to leave once arrests commenced, although applicable regulations clearly required affording each individual an opportunity to leave before being arrested (Tr. 4143-54, 463, 748, 973, 1043, 1263; App. 2149-60, 313, 579, 738, 775, 865). The applicable procedure under established police regulations for making arrests at the scene of a non-violent demonstration is as follows:

> The arresting officers shall approach the persons in violation of the law and shall communicate with them as follows:

> "You are in violation of (give section and description of law violated). You are requested to depart from this area immediately and peaceably or you shall subject yourself to immediate arrest."
>
> If there is noncompliance, the officer shall then state:
>
> "You are under arrest. You are requested to stand up (if sitting)."
>
> If the arrestee stands up and walks he shall be led from the immediate ranks of the crowd to the vicinity of the remainder of the arrest team. If the arrestee declines to walk, he shall be carried by the two officers, one holding each arm, to the aforementioned area where the arrestee shall be photographed along with the arresting officer, if applicable. Metropolitan Police Department General Order, Series 801, No. 1 "Major Civil Disturbances and Mass Arrests Situations", p. 5 (Pl.Exh. 38; App. 2450).19/

No explanation was offered at trial by any police witness for the universal violation of the quoted procedure at both the May 4th and May 5th mass arrests. It is unlikely that the violation was inadvertent. The arrests on both days were carried out by officers of the Special Operations Division, specially trained in problems of crowd control and in handling civil disturbances (Tr. 3416-

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19/ The quoted procedure has been unchanged in Metropolitan Police Department regulations at least since 1968. Cf. General Order No. 3, Series 1968, "Utilization of Arrest Teams at Scene of Non-Violent Demonstrations When Unlawful Acts are Committed", p. 3.

17; App. 1823-24).[20/]

The conclusion that the May 4th and May 5th mass arrests, like those of May 3rd, were made in furtherance of the "general impetus of the program" is surely reasonable, if not unavoidable.

3. Preventive Detention.

Apart from the arrests themselves, there runs through the events of May Week a common thread of what may be described as "preventive detention" -- twisting, perverting and ignoring the collateral system to maximize the duration of imprisonment for all arrestees.

Section 23-1110(a) of the D.C.Code authorizes the police to take bail or collateral for persons charged with misdemeanors in lieu of requiring arrested persons to appear before the Superior Court. During the week prior to May Week, Chief Wilson had unsuccessfully

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20/ In February, 1970, following a mass arrest near the Watergate Apartments, Thomas Johnson, an Assistant Corporation Counsel in charge of screening mass arrests for possible prosecution, warned the Police Department that prosecutions for violating police lines or failure to move on could not be sustained without proof that each individual was personally ordered and given a chance to leave. See, testimony of Johnson in Washington Mobilization v. Wilson, supra, R. 94). Accordingly, Johnson "[a]ll but" ninety (90%) percent of such cases, and most of the rest resulted in non-conviction. Ibid. at pp. 7-9.

attempted to have the collateral schedule raised by the judges of the Superior Court from Ten Dollars ($10.00) to Fifty Dollars ($50.00) (Tr. 2645; App. 1604). At the May 1st meeting in Kleindienst's office, Chief Wilson announced that "in view of the collateral situation with the court, he would not accept collateral which results in the necessity of the court to fix the bond. This might be done on some arrangement by the court on the defendants' promise to leave the city." (Pl.Exh. 12B, p. 4; App. 2425). The solution was simple. If the court would not permit him to increase the collateral limit, Chief Wilson would not use the collateral schedule at all.

On May 3rd, more than seven thousand persons were already in custody by early afternoon. Without field arrest forms, there was no evidence of who the arrestees were, why they were arrested, where they were arrested, or by whom they were arrested. It was obvious that there was no evidence even to identify -- let alone convict -- any of these persons, and accordingly there was no legal basis for holding them. Instead of ordering their release, the federal defendants chose to use the liberty of these seven thousand persons as a bargaining chip to induce the demonstration leaders to cancel any further anti-war demonstrations during May Week, again, without distinguishing between lawful demonstrations and illegal activites (Tr. 1480-84; App. 938-42). When that gambit failed, the defendants followed

through with their threat to attempt to press charges against all those arrested (Tr. 1488-90; App. 946-48).

The impossibility of sustaining charges against those swept up on May 3rd was thoroughly understood by the defendants. It was explained to Kleindienst and the others by Assistant Attorneys General Turner and Will Wilson, and evidently disregarded by Kleindienst as a matter of no relevance or consequence.

Commencing on April 26th, the police had followed a policy of refusing to accept collateral, and requiring all persons to appear before the judges of the Superior Court who held preliminary hearings and set bail. Sullivan v. Murphy, supra, 478 F.2d at 948. The sole apparent exception to this policy occurred on the evening of May 3rd. Faced with the dilemma of not being able to furnish any information on the thousands of May 3rd arrestees and thus being unable to survive a preliminary hearing, defendants acquiesced at a meeting on the evening of May 3rd in the Attorney General's office to Will Wilson's announced policy to release on Ten Dollars ($10.00) collateral persons as to whom there was no adequate police identification (Pl. Exh. 12E, p. 3; App. 2444). Incredible though it may seem, the Attorney General, the Deputy Attorney General and other top-ranking officials of the Department of Justice unquestioningly condoned the patently unlawful detention of

several thousand persons as to whom no evidence of any criminal conduct was known to exist.[21/] In the early morning hours of May 4th, at least one high-ranking official of the Department of Justice was deeply disturbed by the "general impetus of the program". The Deputy Assistant Attorney General for Civil Rights, James Turner, seeing the thousands of unprosecutable persons, many of whom he now believed to have been innocent, imprisoned at the Coliseum and tied up in the seemingly endless "processing" lines which were manufacturing fraudulent arrest records, telephoned Kleindienst and urged him to permit their immediate release (Tr. 1412-13; App. 907-08). The plea was rejected.

On May 4th and May 5th, when field arrest forms were completed for the arrestees, the collateral schedule was again suspended. Plaintiffs, arrested on May 5th, were among the final victims of this policy. Plaintiffs were not permitted to post collateral, but were required to wait hours and days before being taken before a judge. Some

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21/ There can be no contention that the federal defendants did not fully understand the implications of the record-less arrests. Immediately after Will Wilson announced his plan to require such arrestees to post Ten Dollars ($10.00) collateral as a condition of their release, the United States Attorney for the District of Columbia reported that he had been served with papers in a habeas corpus action charging that the arrests were without probable cause and the arrestees were being illegally held. Id. He told the group that he had requested twenty-four (24) hours in which to answer. Id.

were required to wait more than one and one-half days after being fingerprinted, photographed and processed before being taken to court (Tr. 857; App. 662).

B. There Was Evidence Linking Defendant Kleindienst To All Essential Aspects Of The Conspiracy, Including The Demonstration On The Capitol Steps And The Prosecution Of Plaintiffs.

The record in this case reflects a pervasive plan on the part of the defendants to deal indiscriminately with all demonstrators during May Week, 1971, without regard to the fact that they would thereby prevent the legitimate expression of anti-war sentiment. When the eviction from West Potomac Park failed to deter new arrivals or discourage those already here, defendants resorted to a strategy of mass preventive arrests and preventive detention, which characterized all of the May Week activities, including the arrest of plaintiffs.

The jury could fairly conclude that defendant Kleindienst was not merely a participant in this conspiracy, but played a commanding role. It was Kleindienst who (i) presided at the police planning meeting and fixed the "general impetus of the program" of making as many arrests as possible; (ii) conceived and implemented the tactic of giving false assurances to the attorney for the demonstration leadership that the encampment would not be disturbed at a time when the planned eviction was only hours away; (iii) authorized

the "deal" proposed to Hirschkop of releasing the thousands of arrestees if the demonstration leadership would call off further demonstrations and get everyone out of town; (iv) condoned the continued detention of arrested persons as to whom no adequate identification or other evidence existed, subject to posting of collateral; (v) ignored the entreaties of his own Deputy Assistant Attorney General that the detainees' constitutional rights were being violated; (vi) conferred continuously (at least thirty times) during May Week with Chief Wilson; and (vii) authorized the prosecutions of plaintiffs.

The Capitol steps arrests were well within the conspiratorial pale. Although the arresting officer was Chief Powell, Powell was advised, aided and abetted by Chief Wilson. The arrests were carried out by Chief Wilson's S.O.D. officers, under Wilson's watchful gaze. The arrest procedure was identical to that employed by Chief Wilson and the M.P.D. at the Department of Justice on the previous afternoon. Indeed, Chief Powell himself had attended the May 3rd planning session at the Attorney General's office.

The Capitol steps demonstration was demonstrably within both the reach and grasp of Kleindienst. On the morning of May 5th, before the demonstration, Kleindienst met with Chief Wilson and discussed the planned Capitol demonstration and police plans for coping with it

(Tr. 1597-1603; App. 964-970). At the conclusion of the demonstration, Chief Wilson personally called Kleindienst to report the events of the day (Tr. 1600; App. 967). During the subsequent prosecution of plaintiffs, Kleindienst's office was the source of authority for all important decisions (Tr. 1496; App. 954).

CONCLUSION.

For the reasons stated, plaintiffs submit that the trial court erred in granting defendant Kleindienst's motion for directed verdict. The judgment granting said motion should be reversed and the case against defendant Kleindienst remanded for new trial.

Respectfully submitted,

Warren K. Kaplan

Lawrence H. Mirel

OF COUNSEL

Ralph J. Temple
American Civil Liberties Union Fund

May 21, 1976

Mark - 242-4078

3/11/83 — Tc w/ David White re: record on appeal.

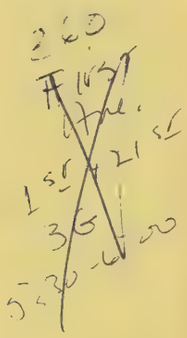
Mary Deaners → Clerk in charge in USDC of Robson
535-3560

She will look for judgment + special verdict forms.
They found the jurors' notes.
We will send her everything else - or write saying to forget it.

3/30 — She is working on it

4/5/83 — Tc w/ Mrs. Whittaker - Mary's Supervisor.
Apparently one volume still missing. But they will send it up anyway so that briefing schedule can be established.

4/14/83 — Tc w/ Mary Deaners. She has transmitted the record minus a number of docs. Will send me a list.



12/16/82 - T/c w/ Marc Johnson.
(.25)
He is sending out today a marked up copy of the docket sheet. DC + I should prepare a stipulation. He will be back Dec. 28th.
We should prepare a motion making As appellants & include a "reasonable" briefing schedule. I told him I'd do it & have it down there for him to review for no objection.

12/14/83 - Looked thru files at Kurt's office to prepare docket list.
(1.0)

12/14/82 TC from Marc Johnston

3:18 p.m. - (202) 633-3305

3:26 p.m.

Contradictory biz about atty's fees pleadings

Stipulate as to anything anyone wants to include

He will compile list of everything everyone has designated

Will be ~~X~~ leaving on Friday - last day in office, Thurs.

We are technically appellants

Cathey's order on 20 days

Need to agree on this & file w/ setting up briefing schedule.

He will contact D.C. and tell them to start thinking about it. He thinks all they have thought is that TIs go first so they have plenty of time.

Told him either you or I would call him back on or before Thurs.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2159 September Term, 19 82

CA 76-01326

Julius Hobson, et al.

v.

Jerry Wilson,
Thomas J. Herlihy,
Jack Acree,
Christopher Scrapper,
Edward Jagen,
John Mahaney &
George Suter,
Appellants

John B. Layton, et al.

And consolidated case No. 82-2160

No. 82-2221
Julius Hobson, et al.

v.

Chief Jerry V. Wilson (Retired), et al.

District of Columbia, a Municipal
Corporation,
Appellant

No. 82-2226
Julius Hobson, et al.

Washington Area Women Strike
for Peace,
Appellant

v.

Jerry Wilson, et al.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2227 -2- September Term, 19 82

Julius Hobson, et al.

Abe Bloom, Arthur I. Waskow, Tina Hobson, David Eaton, Sammie A. Abbott, Richard P. Pollack, Reginald Booker, Washington Peace Center and Washington Area Women Strike for Peace,

Appellants

v.

Jerry Wilson, et al.

O R D E R

It appearing that Nos. 82-2221, 82-2226 and 82-2227 are appeals from the same civil action as Nos. 82-2159 and 82-2160 -- Civil Action No. 76-1326 -- it is

ORDERED that the above cases, Nos. 82-2221, 82-2226 and 82-2227, are consolidated with Nos. 82-2159 and 82-2160. The parties are directed that all future filings in these consolidated cases refer to No. 82-2159 and consolidated cases as the lead docket. It is further

ORDERED that Nos. 82-2221, 82-2226 and 82-2227 shall be on the same briefing schedule as Nos. 82-2159 and 82-2160 and that appellants' briefs are due twenty (20) days after disposition of the pending motion to dismiss in Nos. 82-2159 and 82-2160.

For the Court:

GEORGE A. FISHER, Clerk

By: Daniel M. Cathey
Daniel M. Cathey
First Deputy Clerk

Memorandum from the desk of . . .

MARY BORESZ PIKE

APIs

copies

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM BY DEFENDANT WILLIAM H. WEBSTER
IN RESPONSE TO COURT'S ORDER OF MAY 31, 1982,
REGARDING PRAYER FOR EQUITABLE RELIEF

A. Having received a letter from plaintiffs' counsel regarding the issue of equitable relief, this Court has requested that the parties file brief memoranda on the following issues:

1. Whether plaintiffs' claim for an injunction prohibiting reinstatement of certain discontinued FBI and MPD activities that were the subject matter of their damages claim is moot, or cannot be granted because the remedy at law has been adequate; and

2. Whether plaintiffs' claim for release of their FBI files to them and destruction of all copies to them (sic) should be granted.

As to the first issue, defendant Webster, who is sued in his official capacity as Director of the Federal Bureau of Investigation, makes the following comments:

1. Neither in the original nor in any amended complaint have plaintiffs made any claim for an injunction prohibiting or restraining activities or programs of the Federal Bureau of Investigation.

2. Neither at trial nor in connection with any other proceeding or motion in the course of this civil action have plaintiffs offered evidence to establish (a) any continuing activity by the Federal Bureau of Investigation of the type complained of, (b) any threat of reinstatement by the Federal Bureau of Investigation of the counterintelligence program, or (c) any present or objective future harm to themselves caused by activity of the Federal Bureau of Investigation. By the same token, defendant Webster has had no opportunity to offer contrary evidence.

3. A fundamental element necessary to the award of injunctive relief was capsulized by the Supreme Court in State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. 660 (1931):

> Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared or liable to occur at some indefinite time in the future.

282 U.S. at 674.

This precept has present viability in the courts of the United States, see Wright & Miller, Federal Practice and Procedure: Civil §2942, including the District of Columbia Circuit, see, e.g., Reporters Committee for Freedom of the Press v. American Telephone & Telegraph, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. den., 440 U.S. 949 (1979); Exxon Corp. v. F.T.C.. 589 F.2d 582, 594 (D.C. Cir. 1978), cert. den. 441 U.S. 943 (1979); Long v. District of Columbia, 469 F.2d 927, 932 (D.C. Cir. 1972); Doe v. McMillan, 459 F.2d 1304 (D.C. Cir. 1972); and also Don't Tear It Down, Inc. v. GSA, 401 F. Supp. 1194 (D.D.C. 1975). Consequently, injunctive relief is not appropriate.

The second issue is whether plaintiffs' files should be turned over to them for destruction. Defendant Webster notes with respect to this issue that during discovery in this civil action plaintiffs received their entire files except for material declared privileged and not disclosed. Formal claims of privilege were submitted to this Court, relating principally to state secrets and the identities of informants, and in each instance the Court sustained the claim of privilege. Turning over the files to plaintiffs would nullify the privilege claims and is therefore inappropriate.

In addition, destruction or expunction of the files of plaintiffs is precluded by prior Orders of this Court, United States District Judge Harold H. Greene, in American Friends Service Committee, et al. v. William H. Webster, et al., Civil

Action 79-1655, entered January 10, 1980, and July 1, 1981 (Appeal pending). [See Exhibit A.]. The Orders restrain the Federal Bureau of Investigation from destroying or otherwise disposing of or approving the destruction or disposition of any Federal Bureau of Investigation files. This injunction will remain in effect until such time as the Court approves a detailed record retention and destruction plan. Although certain exemptions and exceptions to the bar against destruction have been included in the injunction, they are not pertinent to the circumstances of this case. In particular, Judge Greene's Order contains no categorical exception permitting file destruction ordered by another court of competent jurisdiction.*/

B. In addition to discussion of the claims for injunctive relief, this Court requested the federal defendants to supply certain information regarding plaintiffs' requests for files made pursuant to the Freedom of Information Act, 5 U.S.C. § 552**/. The following information based on review of FBI records is provided.

Plaintiff Sammie Abbott requested FBI Headquarters files relating to himself and to the Emergency Committee on the Transportation Crisis on December 17, 1975. In 1977, he was given access to the files requested.

Plaintiff Abraham Bloom apparently has not requested his own files. On July 5, 1975, he requested FBI Headquarters files on the Washington Area Peace Action Coalition and the Washington Mobilization Committee. In 1976 and 1977 papers from these files were released to him.

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*/ Even in the absence of the injunction, the relief of file expunction is not automatically granted. See, e.g. Paton v. LaPrade, 524 F.2d 862 (3rd Cir. 1975).

**/ The purpose of this request is unclear inasmuch as plaintiffs have made no claims under the Freedom of Information Act. In any event, during discovery plaintiffs requested and received, except for privilege matters, the files pertaining to them in FBI Headquarters and the Washington, D.C., field.

Plaintiff Richard Pollock requested his FBI Headquarters file on August 14, 1975. Documents were releaseed to him in 1975 through 1978.

Plaintiff Arthur Waskow requested files from FBI Headquarters and the Washington Field Office on April 3, 1975. Papers were released in 1975, and in 1977 he was notified that additional papers were available.

On February 9, 1976, William E. Munger requested the FBI Headquarters files pertaining to the Washington Peace Center. Papers were released in 1977.

On July 16, 1976, plaintiff Tina Hobson requested any files pertaining to her in FBI Headquarters. She was advised that Headquarters had no main files pertaining to her. Subsequently, the Civil Service Commission informed the FBI that it had received a request from Ms. Hobson and that it had documents which had originated with the FBI's Washington Field Office. In 1977 the documents referred from the Civil Service Commission were released.

Plaintiffs Reginald Booker and David Eaton apparently have not requested files or records from the Federal Bureau of Investigation.

CONCLUSION

For the foregoing reasons, plaintiffs' request by letter for injunctive relief should be denied.

Respectfully, submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Vincent M. Garvey

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Attorneys for defendant William H. Webster.

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of June, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Memorandum By Defendant William H. Webster In Response To Courts Order of May 31, 1982, Regarding Prayer For Equitable Relief

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	:	
Plaintiff	:	
v.	:	Civil Action No. 76-1326
JERRY V. WILSON, et al.,	:	
Defendants	:	

MEMORANDUM OF D.C. DEFENDANTS IN OPPOSITION TO INJUNCTIVE RELIEF

On May 31, 1982 this Court requested the parties to file brief memoranda concerning plaintiffs' claim for injunctive relief in the above captioned lawsuit. With respect to the D.C. defendants the specific request was whether plaintiffs' claim for injunctive relief prohibiting reinstatement of certain discontinued practices or activities is moot or, alternatively, cannot be granted because the remedy at law has been adequate. Pursuant to that order, the D.C. defendants submit the following memorandum demonstrating that this court should deny plaintiff's claim for injunctive relief on the below stated grounds.

The factual background in this case has been recapitulated in the post trial pleadings filed by all parties as well as in this court's memorandum opinion. For sake of brevity only that evidence peculiarly relevant to plaintiffs' claim for injunctive relief will be mentioned herein. For purposes of the record, however, the D.C. defendants hereby incorporate by reference the complete factual background contained in their memorandum of Points and Authorities filed in Support of the Motion for Judgement Notwithstanding the Verdict, for New Trial or for a Remittitur.

Plaintiffs seek injunctive relief prohibiting the Metropolitan Police Department from engaging in the type of activity practiced by its Intelligence Division in the late 1960's and early 1970's.

Pursuant to MPD General Order No. 7-G-4 the Intelligence Division of the MPD was authorized to gather information on demonstrators and groups so as to be prepared for any violent or disruptive acts which might result from large scale demonstrations. Plaintiffs did not challenge the lawfulness of this purpose. Indeed the harm they claim to have suffered resulted from the apparent over zealousness of some of the participants and the lack of sufficient guidelines. Accordingly, it was the methods allegedly employed the the FBI and the Intelligence Division that provided the grist for this lawsuit, and not the mere existence of the Intelligence Division, the stated purpose of which is a legitimate law enforcement concern. See Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144 (D.C.D.C. 1976); Laird v. Tatam, 408 U.S. 1. Clearly this Court cannot prohibit the Metropolitan Police Department from engaging in legitimate law enforcement work such as intelligence gathering based only on the concern that some overzealous agent may in the future go beyound lawful practices.

Moreover, at this juncture, the MPD is no longer engaged in the type of conduct which gave rise to this lawsuit. The Intelligence Division engaged in gathering information on demonstrators and groups was abolished . Concurrent with this reorganization nearly all the accumulated files and information gathered by that section was purged as antiquated and no longer useful to the MPD. Former Chief Jerry Wilson testified that it is unlikely that the MPD would again engage in that type of intelligence work. Based upon this background the issue is simply whether plaintiffs fears of future possible abuses is adequate to justify injunctive relief.

While voluntary cessation of alleged illegal conduct does not in and of itself render an issue moot, the D.C. defendants' conduct over the past several years satisfies the general criteria for mootness set forth by the U.S. Supreme Court in United States v. W.T. Grant Co. 345 U.S. 629 (1953).

There the court stated:

> The case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated...The moving party must satisfy the court that relief is needed. The necessary determination is that there exist some cognizable danger of recurrent violations. Something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances....To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations. Id at page 633 (emphasis supplied); Accord, Campbell v. McGruder, 580 F 2d 521, 188 U.S. App. D.C. 258 (1978).

Where, as here, the defendant has not been engaged in the challenged activity for some eight years, has destroyed most, if not all, of the information accumulated during the relevant period and the past misconduct resulted from an overzealous pursuit of a lawful purpose, defendants submit that a reoccurence of that misconduct is, at best, conjectural and therefore not the proper object of injuctive relief. The future course of social protest is impossible to predict, however, it is unlikely that the combination of factors which led to the past abuses is likely to reoccur in the near future. In sum, there are too many intangibles which must first come to fruition before even the possibility for future misconduct becomes a real concern.

The circumstances here contrast sharply with those found by the Court in Campbell v. McGruder, supra, where the court refused to conclude that the issues were moot. That case involves a suit challenging long standing oppressive condition in the District jail, conditions which the court noted would continue to be unacceptable in the future. Further, the court found that the District demonstrated an ad hoc approach to various problems at the institution, problems dealt with only where a court hearing had been scheduled during the course of the five year litigation. The Court refused to find mootness, noting

> ***the history of defendants' grudging resistance, the ineffectiveness of their previous efforts at compliance and the flagrant and shocking character of the past violation. id, at page 541.

Moreover the superintendent of the institution testified that there was a strong possibility that past condition would continue in the future even after the opening of a new facility.

The record in this case simply cannot support a finding even remotely approaching the situation in McGruder. There has been no "grudging resistance" to change their practice since the offending practices were abolished prior to the institution of this lawsuit. Moreover, there was testimony that the alleged abuses would not likely reoccur.

Therefore, the only "evidence" plaintiffs can marshall to justify injunctive relief is the speculation that defendants may in the future engage in similar activity. The court in W.T. Grant Co., however, stated emphatically that

> ***something more than the mere possibility must serve to keep the case alive. W.T. Grant, supra at p. 633 see also, Reporters Committee v. American Telephone and Telepgraph. 593 F. 2d 1030, 1069, 192 U.S. App. D.C. 376 (1978), cert. denied. 99 S. Ct. 1431. Rizzo v. Goode, 423 U.S. 362 (1976). Allee v. Med'rano. 416 U.S. 802 (1974) (prospect of future abuse must be based on the imminence of future misconduct)

Such conjecture is simply inadequate to establish that the alleged threat of future harm is clear and imminent. See Ashland Oil, Inc. v. F.T.C. 409 F. Supp. 297, aff'd 548 F. 2d 977 (1976) (injunctive relief is appropriate only to prevent existing or presently threatened injuries.) Accordingly, the District of Columbia defendants submit that the issue is moot and not likely to reoccur and therefore not an adequate basis for a grant of injunctive relief.

Additionally, plaintiffs clearly have had an adequate remedy at law. They have had their day in court and have been compensated to a degree which even this Court noted was extravagant, More importantly, the availability of the damage remedy is ample deterrent to prevent any repetition of the acitvities which gave use to this lawsuit. Accordingly, plaintiffs' legal remedy has been adequate.

To justify prospective equitable relief courts have required a strong showing of irreparable injury and inadequacy of the legal remedy. As stated in District of Columbia v. North Wash. Neighbors, Inc. 336 A 2d 828, at page 829, (D.C. App. 1977), appealed after remand, 367 A 2d 143 (1976), cert. denied, 98 S. Ct. 68, 434 U.S. 823, (1977) "The general rule is that an injunction will not be granted where the award of money damages gives full and complete satisfaction for any injury suffered (citations omitted). See also Allee v. Medrano, 416 U.S. 802 (1974).

In the context of police conduct the United States Court of Appeals for the District of Columbia Circuit noted the following in the case of Long v. District of Columbia 469 F 2d 927, 932, 152 U.S. App. D.C. 187, 192 (1972)

> Considerations of policy dictate that the courts act cautiously in granting injunctions against police action. A court should not bind the hands of the police or the mere possibility that certain conduct may be repeated.
> ...In order for a court to grant an injunction there should be a showing that there is a substantial risk that future violations will occur.
> ...In order to show a substantial likelihood of future conduct, a clear pattern of harassment must be shown

In Reporters Committee, supra the court similarly stated.

> ...judicial supervision of police activity predicated on the prospect of future abuse must be based on the immience of future misconduct. The mere possibility of future conduct is simply not enough. 593 F 2d at 1069, 192 U.S. App. D.C. 415-416

In the case at bar there is no evidence o any prospect for future abuse and, therefore, no basis for injunctive relief.

Based on the foregoing the D.C. defendants submit that injunctive relief should be denied on the grounds that no showing can be made that there is any reasonable expectation that the alleged misconduct will be repeated and that the issue is accordingly moot. As further grounds, plaintiffs' remedy at law has been adequate and complete.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of D.C. Defendants in Opposition to Injunctive Relief was mailed, postage prepaid, to Anne Pilsbury, Esquire, Attorney for Plaintiffs, 17 Danforth Street, Norway, Maine 04268; and David White, Esquire, Attorney for Federal Defendants,

ED
DT

Department of Justice, Washington, D.C. 20530, this 15 day of June, 1982.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM BY DEFENDANT WILLIAM H. WEBSTER
IN REPLY TO PLAINTIFFS' MEMORANDUM
ON NEED FOR INJUNCTIVE RELIEF

Having not prayed for injunctive relief in the amended complaint, having not moved for injunctive relief in the form contemplated by the rules of civil procedure,*/ having not presented evidence of present harm or objective threat of future harm, and having not explained in any meaningful way the form of equitable relief which would satisfy them, plaintiffs now argue that the award of damages can never be adequate and that the Court may enjoin activity which is not now occurring.

Plaintiffs state that damages can never be adequate to redress injury to their constitutional rights; however, the award of substantial damages was the only relief plaintiffs sought until the Court, sua sponte in the midst of trial, raised the issue of equitable relief. The defendants note with considerable interest that what the Court agrees is an extravagant award threatening their very way of life is dismissed by plaintiffs as being merely "inadequate." In any event, whether or not plaintiffs are satisfied with the result, a damage action implied from certain provisions of the Constitution of the United States has been available as a remedy at law since Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), to redress alleged violations of protected rights. This Circuit has never suggested that damages were per se inadequate in the context of alleged violations of constitutional rights. See, e.g., Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977); and Tatum v.

*/ See, e.g., Rules 7 and 65, Federal Rules of Civil Procedure.

Morton, 562 F.2d 1297 (D.C. Cir. 1977). The concept of compensatory damages, see, e.g., Carey v. Piphus, 435 U.S. 247 (1978), is meaningless if damages are insufficient as a matter of law. Inasmuch as the Courts have recognized that actions for damages, brought pursuant to the rationale of Bivens, supra, or pursuant to 42 U.S.C. §1983, provide an adequate remedy at law, plaintiffs are not entitled to the further, extraordinary remedy of injunctive relief. See, generally Wright & Miller, Federal Practice and Procedure: Civil §2942, at 368 ff.

Plaintiffs cite five cases which they contend support the proposition that injunction is proper even in the absence of proof of present harm and continuing wrongful conduct. These cases are misapplied by plaintiffs, however, for they are not in conflict with the notion that injunction will not issue where there is no existing or presently threatened injury. State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. 660 (1931).

In Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974), the Court found that there had been no change in policy by defendants and that the events which led to the injury to the plaintiff class could recur. In Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978), the Court found that despite new jail facilities there still existed the probability of overcrowding and consequently the issue had not become moot.

The decision in Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976), was on motion by defendants for summary judgment. This Court ruled that plaintiffs were entitled to discovery to contravene defendants' assertion that the activity complained of could not recur due to change in regulations effected after suit was filed. This Court did not hold that an injunction would be granted.

In Allee v. Medrano, 416 U.S. 802 (1974), defendants had argued that the controversy was moot because plaintiffs had ceased their union organizing activity. The Court held that the issue was not moot; the plaintiff union remained an active organization with the goal of unionizing farmworkers. Whether defendants had changed their policies or practices was not at issue.

The court of appeals entered an injunction in Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), against police practices even though a General Order had been issued by the police commissioner subsequent to the filing of the suit to control the offensive activity. The court found (1) the General Order was not specific enough to address the particular practices complained of, 364 F.2d at 203, (2) the injunction was necessary in the interest of public tranquility, 364 F.2d at 205, and (3) the injunction would be helpful to the new police commissioner in the exercise of authority over the police force, id.

None of these cases are applicable to the present action. Plaintiffs have proven no instances of offending conduct later than July, 1973. Moreover, the programs and activities complained of have been the subject of thorough inquiry by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2nd Sess. [Church Committee] and by the Comptroller General of the United States, Report to the House Committee on the Judiciary: FBI Domestic Intelligence Operations (February 24, 1976), and Congress has not believed it necessary to enact a general charter regarding Federal Bureau of Investigation activities. There is thus no private or public interest warranting imposition by this Court of an injunction against the Director of the Federal Bureau of Investigation.

CONCLUSION

For the foregoing reasons, plaintiffs are not entitled to injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of June, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Memorandum By Defendant William H. Webster In Reply to Plaintiffs' Memorandum on Need for Injunctive Relief.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.	:	
Plaintiffs	:	
v.	:	Civil Action No. 76-1326
JERRY WILSON, et al.	:	
Defendants	:	

REPLY OF D.C. DEFENDANTS TO PLAINTIFFS' MEMORANDUM ON NEED FOR INJUNCTIVE RELIEF

On May 31, 1982, this Court requested that the parties file brief memoranda concerning plaintiffs' claim for injunctive relief in the above captioned lawsuit. D.C. defendants filed their memorandum with the Court on June 15, 1982. Counsel for D.C. defendants received a copy of plaintiffs' memorandum on June 14, 1982. Although plaintiffs' memorandum is directed almost entirely towards the Federal defendants,*/ a few words need be said in reply. A close look at the cases and arguments that plaintiffs muster in support of their contention that injunctive relief is appropriate, in fact, reinforce the position of D.C. defendants set forth in their memorandum to the Court. The plaintiffs have an adequate remedy at law and any issues regarding injunctive relief are moot vis à vis the D.C. defendants.

*/Plaintiffs allude only to the possibility of continued Federal COINTELPRO programs or practices and not at all to the possibility of continued illegal practices or programs by D.C. defendants. See, Plaintiffs' Memorandum, pp1, 3 and 4. As such, it appears plaintiffs virtually concede the lack of any need for injunctive relief against D.C. defendants.

DAMAGE AWARDS ARE ADEQUATE REMEDY AT LAW

Plaintiffs assert that in the instant case the defendants violated their constitutional rights guaranteed by the First Amendment to the Constitution. For this reason alone, they assert that "their loss is irreparable as a matter of law and damages can never be adequate". Plaintiffs' Memorandum, page 2 (. emphasis supplied). However, no case cited by plaintiffs in their memorandum sets forth this extreme proposition. Additionally, plaintiffs mistate the law with respect to damages as an adequate remedy at law where First Amendment rights are involved.

The first case cited by plaintiffs in support of their position is International Association of Firefighters v. Sylacauga, 436 F. Supp. 482 (N.D. Ala. 1977). This case involves the city's violations of plaintiff's property interest in the promotional procedures for fire fighters set forth under state law. The plaintiffs, a fire fighters' union and union members, challenged, among other matters, the failure of defendants to promote officers in the fire department by competitive appointment and competitive exams. Unlike the case at bar, the plaintiffs in Sylacauga needed injunctive relief to force a change in defendant's practices so as to allow individual firefighters to compete for promotion. Thus, in Sylacauga, money damages would not have been adequate relief. Nowhere in the Sylacanga opinion does the Court state that damages can never be adequate where constitional rights are involved.

The second case upon which plaintiff's inexplicably rely is Sampson v. Murray, 415 U.S. 61 (1974). Plaintiffs' reliance on Murray is clearly misplaced since the Supreme Court in Murray denied injunctive relief on grounds that alleged deprivation of plaintiff's rights could be compensated

for by subsequent reinstatement and back pay award. Thus, Murray actually supports defendants' position.

The third case cited by plaintiffs in support of their assertion that damages are not an adequate remedy at law is Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966). The Lankford case involves massive police violations of the Fourth Amendment rights of the citizens of Baltimore, and, in particular, the Black Community. The police, in an attempt to apprehend a killer of a fellow officer, had engaged in 300 searches of houses over a period of 19 days based solely on uncorroborated annonymous tips. The court felt the plaintiffs' case warranted injunctive relief for three reasons, none of which are applicable to D.C. defendants. First, the court observed that this large scale violation of citizens rights at issue before the court also occurred routinely and was likely to reoccur in other instances where the police attempted to apprehend persons accused of serious crimes. Lankford, at 201. Second, the court held that money damages were inadequate in this instance because the personal assets of police officers were minimal and there would be no compensation available from public funds. Lankford, at 202. The court, however, nowhere stated that money damages can never be adequate where constitutional rights are involved. Third, the court expressed its concern that persons who were not ultimately accused of crimes would not ordinarily find appropriate recourse from the courts to redress unlawful police intrusions into their houses. None of these factors cited by the Lankford court are present in the instant case. As has been stated previously, the Metropolitan Police Department is no longer engaged in, and is unlikely to again engage in, the type of conduct which gave rise to this lawsuit. D.C. Defendants Memorandum, p.2. Additionally, plaintiffs who can

show that police have violated their constitutional rights can bring an action alleging constitutional tort.

In sum, no case cited by the plaintiffs supports their contention that money damages are inadequate as a matter of law where constitutional rights are involved. Indeed, the case Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976) cited elsewhere by plaintiffs clearly sets forth that in this jurisdiction, as in other jurisdictions, money damages are available for violation of First Amendment rights. Indeed, the language of the Berlin court underscores that money damages are the most appropriate remedy available. The court therein stated:

> ***"Once a citizen's first amendment rights have been violated, he is without redress in the absence of monetary award."

Berlin, at 161. In the instant case, the plaintiffs have not been without redress. Money damages, albeit excessive awards, have been given them by the jury. As such, they have had an adequate remedy at law.

ALL ISSUES RELEVANT TO THE ALLEGED WRONGFUL ACTS OF D.C. DEFENDANTS ARE NOW MOOT

The plaintiffs nowhere in their memorandum specifically address the issue of mootness with respect to the D.C. defendants. They only point to the possibility of future occurrence of misconduct by the Federal defendants. Additionally no cases cited by plaintiffs in their memorandum lend support to the appropriateness of this Court entering an injunction against the D.C. defendants. Plaintiffs refer this Court to five cases in their memorandum which they claim support their position that "where First Amendment rights are involved, the courts have not hesitated to enter injunctions, even in the face of official repentence and change of policy". Plaintiffs' Memorandum, p.2. In none of these five cases, however,

did the court find evidence of clear change of policy, and a demonstration that there was little likelihood of reoccurrence of the complained about wrongful activities. As such, these cases are not applicable to D.C. defendants. D.C. defendants have presented clear evidence, undisputed by plaintiffs, both of change of policy and that there is little likelihood of any reoccurrence of the alleged wrongful act.

The first case cited by plaintiffs on the mootness issue is Allee v. Medrano, 416 U.S. 802 (1973). This case, however, has nothing to do with officials "repenting" or changing their policy, contrary to the suggestion in plaintiffs' memorandum. The case is a class action lawsuit brought by named plaintiffs and the United Farm Workers Organizing Committee who, among other matters, sought injunctive relief against various law enforcement groups and a Justice of the Peace. In Allee, the defendants' use of persistent illegal police activities, including physical abuse and terror tectics, had crushed and continued to chill the efforts of the union to organize. The court refused to find the issues moot and granted plaintiffs' request for an injunction. The court stated that without an injunction, the plaintiffs would have been without any means to legally exercise their First Amendment rights of free speech, assembly, and association, because the illegal police activities were likely to reoccur. Allee, at 804-05, 807, 809-11, 814-15. The facts in Allee are unlike these in the instant case. Plaintiffs in Hobson do not claim that the D.C. defendants now engage, or ever engaged, in terror tactics or physical abuse. They also do not claim that their present efforts to organize and/or speak out on issues is chilled now or will be chilled in the future by any actions of the D.C. defendants. Additionally, the D.C. defendants have long since ceased the alleged wrongful acts about which plaintiffs complained, including changing

the official policy towards information-gathering on groups.

The second case cited by plaintiffs on the issue of mootness is Rowley v. Goodman, 502 F.2d 1326 (4th Cir. 1976). The plaintiffs in Rowley alleged they were denied admission to, were ejected from, and/or arrested at a rally honoring Billy Graham which was attended by the President of the U.S. They claimed they were singled out for this treatment by the F.B.I. and Secret Service because of their opposition to the Vietnam War and their other activities in support of the peace movement. The Court refused to find the issue moot because it was foreseeable that the F.B.I. and Secret Service would engage in the same kinds of actions against the plaintiffs in the future at another rally or event attended by the President. The lynchpin of the Rowley Court's holding was the likelihood of reoccurrence of the injury. THe court found no indication of any change of policy by those protecting the President when he attended public rallies.

The third case cited by plaintiffs is Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (1976) (hereinafter "BDC"). The plaintiffs were American citizens and organizations and one Austrian citizen, residing in West Berlin or West Germany. They alleged that the U.S. Army engaged in various intelligence operations against them because of their political activities including supporting Senator McCarthy for president in 1972 and supporting efforts to impeach former President Nixon in 1973. BDC, at 147. The intelligence activities about which they complained included warrantless electronic surveillance, cover infiltration of their meetings,blacklists, and maintenance and distribution of "dissidence identification" file. The defendants contended that the case was moot because of the issuance of two army regulations. However, the court disagreed. It observed that one of the regulations did not cover some of the conduct about which plaintiffs complained,

i.e., the use of wiretaps without prior judicial authorization.

Secondly, the court stated it was not willing to accept at face value defendants' assertions that certain illegal activity, prohibited under the second regulation, had ceased. The court gave three reasons for its disbelief of defendants' assertions that policy had changed, none of which are applicable in the Hobson case. First, the defendants already had made prior misrepresentations to the court about their conduct. Second, despite the promulgation of the regulations, the Army had since undertaken at least some actions similar to that about which plaintiffs were complaining. Third, the defendants had already engaged in such a pervasive and long-standing pattern of allegedly illegal activity that the court required more than self-serving statement by defendants to find that their activity would not continue in the future. BDC, at 153. In sum, the court in BDC would not find mootness because it did find any clear evidence of official change of policy.

The fourth case plaintiffs cite in support of their position is Lankford v. Coelsfon, supra. This case has already been discussed above. As was pointed out in that discussion, the court believed there was a likelihood of the reoccurrence of the illegal activity, if not on such a massive scale, at least in the more routine attempts by police to apprehend persons they viewed as quilty of serious criminal behavior. In short, the court saw no clear evidence of a change in police activity. Additionally, that case, as discussed above, also turned and the court's view that the plaintiffs had no adequate remedy at law.

The last case cited by plaintiffs in support of their position is Campbell v. McGruder, 580 F.2d (D.C. Cir. 1978). Campbell v. McGruder was discussed in detail in the initial

memorandum submitted by D.C. defendants. The facts in Campbell v. McGruder clearly illustrate the kind of facts which should be before a court to justify injunctive relief. As already discussed, these kinds of facts are not present in the instant case. In Campbell v. McGruder, the plaintiffs complained about various long-standing "flagrant and shocking" conditions in the District jail. The court noted that many of these conditions would remain unacceptable in the future. Campbell v. McGruder, at 541. Additionally, defendant agreed there was a strong possibility that poor conditions would continue in the future. Campbell v. McGruder, at 541-42.

Conclusion

In sum, plaintiffs in the case at bar are asking this Court to issue injunctive relief against the D.C. defendants without giving the Court one iota of proof that there is a likelihood of reoccurrence of injury. In every case the plaintiffs cited on the issue of mootness, the courts observed that there was a strong likelihood of the reoccurrence of deliberate wrongdoing in the future based on facts peculiar to those cases. In the instant case, there is no suggestion, much less any proof, of such a likelihood. Accordingly, the issues before this Court with respect to the D.C. defendants is moot and injunctive relief would be inappropriate.

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Roberta L. Gross

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727-6297

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of D.C. Defendants to Plaintiffs' Memorandum on Need for Injunctive Relief was mailed, postage prepaid, to David H. White, Esquire, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, Attorney for F.B.I.; and to Anne Pilsbury, Esquire, 17 Danforth Street, Norway, Maine 04268, this 22nd day of June, 1982.

Roberta L. Gross

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727-6297

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs	
v.	Civil Action No. 76-1326
JERRY WILSON, et al., Defendants	

STIPULATION

Pursuant to Rule 11(f) of the Federal Rules of Appellate Procedure, it is hereby stipulated by counsel for the plaintiffs and counsel for the defendants that the record on appeal shall include all jacket entries that are listed on the docket and are presently part of the record in the District Court, except those entries which have their filing date underlined in red in the docket attached hereto, as well as all exhibits admitted into evidence at trial. Those exhibits will be returned to the District Court under separate cover.

It is hereby also stipulated that all exhibits admitted into evidence on behalf of the plaintiffs shall be retained by counsel for the plaintiffs until plaintiffs' brief on appeal is filed with the United States Court of Appeals. At that time counsel for the plaintiffs will file plaintiffs' exhibits with the District Court so that they may be transmitted to the Court of Appeals as a supplemental record.

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United States Attorney
Appellate Staff, Civil Division
Attorney for Federal Defendants
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Stipulation was mailed, postage prepaid, to Herb Semmel, Esquire, Antioch School of Law for the Urban Law Institute, 1624 Crescent Place, N.W., Washington, D.C. 20009; to Randolph Scott-McLaughlin, Esquire, Center for Constitutional Rights, 853 Broadway, New York, New York, 10003; to Morton Stavis, Esquire, Center for Constitutional Rights, 853 Broadway, New York, New York, 10003; and to Mary Boresz Pike, Esquire, 233 Broadway, Suite 670, New York, New York 10279, this 23rd. day of December, 1982.

RICHARD B. NETTLER
Assistant Corporation Counsel, D.C.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

RESPONSE BY FEDERAL DEFENDANTS TO
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

Plaintiffs have moved for a protective order that they not be required to answer certain discovery requests by defendants regarding plaintiffs' application for attorneys' fees. Having received answers to most of their requests, federal defendants require responses to only one area of inquiry objected to by plaintiffs in order to oppose the application for attorneys' fees; the disposition of the fees attributed to the efforts of the late David Rein.

The application by plaintiffs seek $19,968.75 on behalf of David Rein. This is a significant amount of money. Inasmuch as the defendants are being asked to pay this amount, they are entitled to know who is the intended recipient. If these funds are not to be disbursed to Mr. Rein's estate or to someone else in accordance with some arrangement made by Mr. Rein prior to his death, then there exists the theoretical possibility of improper enrichment. To put the matter directly, if the funds are distributed to the plaintiffs themselves or to the other counsel who participated in this action, then the award based on Mr. Rein's efforts constitutes an additional award to them to which they are not entitled and an additional punitive measure against the defendants.

Plaintiffs have suggested that the federal defendants' inquiry in this matter is in "poor taste." [See Plaintiffs' Response to Defendants' Opposition to Request for Attorneys' Fees, dated March 25, 1982, at page 5]. But since it is the

defendants' who are being asked to pay $20,000, they are entitled to know the intended recipient.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Vincent M. Garvey
VINCENT M. GARVEY

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Attorneys for Federal Defendants.

CERTIFICATE OF SERVICE

I hereby certify on this 17th day of November 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Response by Federal Defendants To Plaintiffs' Motion for Protective Order to:

Herb Semmel, Esquire
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DAVID H. WHITE
Attorney, Department of Justice
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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 76-1326
v.	)	
	)	
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MOTION BY FEDERAL DEFENDANTS FOR ENLARGEMENT OF TIME TO SUBMIT ADDITIONAL OPPOSITION TO PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES

Defendants Charles Brennan, George C. Moore, Courtland Jones, Gerould Pangburn, and Gerald Grimaldi, through their undersigned counsel and pursuant to Rule 6 of the Federal Rules of Civil Procedure, move this Court for an enlargement of time to and including December 6, 1982, in which to submit an additional memorandum in opposition to plaintiffs' application for attorneys' fees.

In support of this motion defendants aver that plaintiffs have recently responded to the defendants' discovery requests pertinent to the application for attorneys' fees. Counsel for defendants has been engaged in the trial of Alan McSurely, et al. v. John K. McClellan, etc., et. al., Civil Action No. 516-69, before United States District Judge William B. Bryant; consequently, counsel has been unable to devote sufficient time to the attorneys' fees issue to complete a supplemental memorandum based on the plaintiffs' discovery responses. The time requested should be sufficient to complete the memorandum.

Respectfully submitted,

J. PAUL McGRATH

STANLEY S. HARRIS
United States Attorney

VINCENT M. GARVEY

DAVID H. WHITE

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Washington, D.C. 20530

Attorneys for federal defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 76-1326
v.	)	
	)	
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

ORDER

This cause having come before the Court on motion by federal defendants for an enlargement of time to and including December 6, 1982, in which to file an additional response to plaintiffs' application for attorneys' fees, and the Court being fully advised in the premises, it is this _____ day of _____, 1982,

ORDERED that the federal defendants shall have to and including December 6, 1982, within which to submit an additional memorandum in opposition to plaintiffs' application for attorneys' fees.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 29th day of November 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Motion by Federal Defendants For Enlargement of Time to:

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 76-1326
	)	
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	
	)	

SUPPLEMENTAL MEMORANDUM BY DEFENDANTS BRENNAN, MOORE, JONES, GRIMALDI, AND PANGBURN IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES

In connection with their opposition to plaintiffs' application for attorneys' fees, the federal defendants submitted several discovery requests designed to clarify certain factual issues raised by the application. Plaintiffs answered most of the discovery requested, and those answers demonstrate that the application is substantially deficient and should be denied in its entirety. The federal defendants incorporate all arguments set forth in memoranda filed on March 12, and October 4, 1982.

Plaintiffs are not entitled to recover for time devoted to unsuccessful pursuits, Copeland v. Marshall 641 F.2d 880, 891 (D.C. Cir. 1980); however, they have made no effort in their application for attorneys' fees to satisfy this rule. Their answers to interrogatories show that the principal attorneys for plaintiffs excluded from their application a total of 18 hours spent on behalf of plaintiff Washington Area Women Strike for Peace. No time was excluded from the application for time spent by any attorney on behalf of plaintiffs Julius Hobson and Emergency Committee on the Transportation Crisis. [See Interrogatories 4 and 7, and the responses.]

No time was excluded from the application for time spent by any attorney in prosecuting this civil action against the thirty-five individual defendants who prevailed. [See Interrogatories 5 and 8, and responses.]

No time was excluded from the application for time spent by attorneys Schember, McNeil, and Pilsbury in connection with the formal claims of privilege, plaintiff's motions to compel answers

to the Second and Fourth sets of interrogatories, and plaintiffs' motion filed on April 30, 1980, to amend the complaint. [See Interrogatory 6 and the response.]

Plaintiffs admit that the application includes time spent by attorneys and law students that did not involve the rendition of professional legal services, such as proofreading deposition transcripts, recording duplicate tapes, setting up chairs, tables and equipment for despositions, discussions with newspaper reporters, carrying documents to the clerk's office, indexing depositions, organizing files, and other administrative tasks. [See Interrogatory 11 and response.] The time sheets for attorney J.E. McNeil, for example, record a significant number of hours devoted to such tasks for which plaintiffs are seeking the full hourly rate.

Additional irregularities in the application occur in the claim on behalf of attorney Ralph Temple, for which there is no supporting documentation, and the claim for the Jury Project, for which there is no supporting documentation or justification. The claim for Ralph Temple is based on guesses, which under National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir 1982), is not acceptable. The claim for the Jury Project is not supported by any explanation of when and how time was spent, by any justification for the alleged hourly fee, or by any authority demonstrating that the expense is compensable either in general or in this particular case.

Plaintiffs have made no reasonable effort to satisfy the requirements of this Circuit in submitting an application for attorneys fees. They are seeking fees for which they clearly are not entitled, documentation to portions of the application is inadequate, and the application is so excessive as to be irresponsible. These deficiencies justify denial of any award whatsoever. Jordan v. United States Department of Justice, 89 F.R.D. 537 (D.D.C. 1981).

Respectfully submitted,

J. PAUL McGRATH
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STANLEY. HARRIS
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Brennan, Grimaldi, Moore,
Jones and Pangburn

CERTIFICATE OF SERVICE

I hereby certify on this 7th day of December, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Supplemental Memorandum By Federal Defendants in Opposition To Plaintiffs' Application For Attorneys Fees, and proposed Order.

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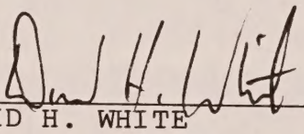

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